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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 89

UNITED STEELWORKERS OF AMERICA, AFL–CIO, AND LOCAL 5895, UNITED STEELWORKERS OF AMERICA, AFL–CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD AND CARRIER CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals, as amended on petitions for rehearing (R. 385–418, 438–441), is reported at 311 F. 2d. The decision and order of the Board (R. 312–373) are reported at 132 NLRB 127.

JURISDICTION

The judgment below was entered on October 18, 1962 (R. 419), and petitions for rehearing were denied on December 12, 1962 (R. 443–444). The petition for a writ of certiorari was filed on March 12, 1963, and

was granted on May 13, 1963 (R. 444).[1] The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Sections 10 (e) and (f) of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, are set forth in the Appendix, *infra*, pp. 27–28.

QUESTION PRESENTED

Whether Section 8(b)(4)(B) of the National Labor Relations Act prohibits a union, in the course of a lawful strike at an industrial plant, from picketing the entrance to a railroad-owned spur track immediately adjacent to the struck premises, for the purpose of inducing persons employed by the railroad not to make pickups and deliveries at the struck plant.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On January 15, 1960, the United Steelworkers of America, AFL–CIO was certified by the Board as the representative of production and maintenance employees of Carrier Corporation, at its plant in Syracuse, New York. On March 2, 1960, when the parties were unable to reach agreement on a contract, the Union called a strike in support of its demands (R. 314–316; 42, 55–56). During the strike the Union picketed the several gates leading to the Company's plant—the employee and truck entrances, as well as a

[1] The Board filed a memorandum in response to the petition, in which it indicated that, if the petition were granted, the Board would participate in the proceeding and defend its order.

gate through which the switch tracks of the New York Central lead to the Company plant and the plants of several other employers (R. 316; 58–60, 311). This case concerns the picketing at the railroad gate.

The western boundary of the Carrier plant runs along Thompson Road, a public highway, and is enclosed by a link fence on the east side of the road. A spur track of the New York Central crosses Thompson Road at the southern boundary of the plant, and continues for some distance (in an easterly direction) along that boundary. (R. 363, 317; 78–79, 311.) By means of this spur the railroad furnishes freight service to Carrier, and to several other plants in the vicinity (R. 317; 311).[2] The right-of-way on which the spur is located, a strip approximately 35 feet wide, was originally owned by Carrier and then conveyed by it to the railroad (R. 318, 365). It is enclosed by a wire fence, which is a direct continuation of the Thompson Road fence surrounding the Carrier property (R. 363; 148–150, 311).[3] Access to the railroad right-of-way is by means of a gate which was padlocked when not used for railroad switching services and was not accessible to Carrier employees (R. 319, 363; 44–45, 60, 69–70, 77–80, 139, 146–148, 305–307). The railroad had to use the gate in order to deliver raw materials and

[2] After the spur track enters the gate, a number of subsidiary tracks branch off from it and lead into the various plants. There are 12 such subsidiary tracks into the Carrier plant and warehouse facilities (R. 311).

[3] The Thompson Road fence continues past the railroad right-of-way, then turns at a right angle from Thompson Road, and continues in an easterly direction (R. 311).

parts to the Carrier plant and the other plants in the vicinity, and to ship out finished goods (R. 365; 62, 311).

During the first days of the strike, the railroad continued to make deliveries to the other plants along the right-of-way inside the fence, without hindrance by the pickets (R. 319; 82–84, 106–107, 110–111, 239–240). But the railroad unions, representing the train service employees, indicated to the railroad that their members did not wish to cross the picket line in order to furnish service to Carrier, and the railroad did not make deliveries to or from Carrier prior to March 11, 1960 (R. 319, 95–98, 112–115). On that day, pursuant to arrangements made with Carrier, the railroad, using supervisory personnel, undertook to pick up 14 loaded cars at the Carrier plant and to deliver a like number of "empties" (R. 319–320; 82–83, 87–88). In carrying out this work, the train made several passages through the railroad gate. The Union pickets obstructed the train movements by congregating on the track and other action. The train was able to pass only after the pickets were dispersed by sheriff's deputies. (R. 320–322; 87–90, 92–93, 123–124, 135–136, 284–285, 292–293.)

B. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Trial Examiner found that the picketing at the railroad gate violated Section 8(b)(4)(i) and (ii)(B) of the Act in that it

sought to induce a work stoppage by railroad personnel, and to restrain the railroad, for an object of forcing it to cease doing business with Carrier (R. 323–325). He further found that the Union had restrained and coerced the Carrier employees, in violation of Section 8(b)(1)(A), by barring ingress and egress at the other gates to the plant, by the use of threats and physical force against such employees, by assaulting police officers in their presence, and by obstructing the ingress and egress of railroad personnel in their presence (R. 325–340).[4]

The Board sustained the Examiner's findings of a Section 8(b)(1)(A) violation and entered an appropriate remedial order (R. 326–363, 367–368).[5] It concluded, however, (with one Member dissenting) that the picketing at the railroad gate was primary activity and thus not proscribed by Section 8(b)(4)(i) and (ii)(B), and accordingly dismissed the complaint insofar as it alleged a violation of that section (R. 363–366, 368).

With respect to the picketing at the railroad gate, the Board pointed out that it was carried on at the

[4] Much of this activity occurred at gates other than the railroad gate. However, several Carrier employees witnessed the obstructing tactics which occurred at the railroad gate. Moreover, some of the pickets threatened with physical harm two non-striking employees of Carrier who were sent to the railroad gate to take photos of the train incidents (R. 326–329, 336–337).

[5] The Union consented to the entry of a decree enforcing this portion of the Board's order, and it is not relevant to the portion of the case now before this Court. See *infra* pp. 24–26.

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site of the Carrier plant and merely sought to deter the railroad and its personnel from performing services related to Carrier's normal operations. In these circumstances, the Board held that the picketing was primary under the test enunciated in *Local 761, International Union of Electrical Workers* v. *National Labor Relations Board*, 366 U.S. 667, notwithstanding that the gate through which the train passed was on a right-of-way owned by the railroad (R. 364–366).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals (in an opinion by Judge Waterman, with Judge Swan concurring in the result and Chief Judge Lumbard dissenting) set aside the Board's dismissal of the complaint. The court concluded that the picketing at the railroad gate was secondary, and thus in violation of Section 8(b)(4)(B), because "the union was not furthering its legitimate objective of publicizing its dispute to Carrier employees. * * * In picketing on the railroad right-of-way the union demonstrated that its manifest, and *sole*, objective was to induce or encourage railroad employees, or to coerce the railroad, to refuse to handle Carrier goods, or otherwise to deal with the primary employer" (R. 403). This Court's decision in *Local 761, supra*, was distinguished on the ground that it "dealt with picketing *at the premises of the primary employer*," whereas here "the union activity occurred on the right of way of the New York Central * * *" (R. 407).

Chief Judge Lumbard, dissenting, agreed with the Board that the picketing at the railroad gate was legitimate primary activity under the test enunciated in *Local 761, supra*. He stated (R. 408):

> * * * the lawfulness of picketing depends on the legitimacy of the union's objective; the place where the picketing occurs is controlling only insofar as it sheds light on the union's objective. The legitimate objectives of picketing include publicizing a dispute to employees of neutral employers who are performing part of the everyday operations of the struck employer. Since the picketing which occurred here had that objective, and since there was no other place where the union could conduct such picketing, I agree with the National Labor Relations Board that there was no violation of the Act.

Petitions by the Board and the Union for rehearing before the court *in banc* were denied (R. 441-442).

SUMMARY OF ARGUMENT

The Board's findings of fact show that this is a simple—indeed, elementary—case of primary picketing protected by the proviso to Section 8(b)(4)(B). The majority in the court of appeals unfortunately became confused by some of the complex rules applicable to situations where two employers are engaged in independent operations at a common site, but never before applied to picketing aimed at stopping deliveries which are part of the struck employer's normal business at the scene of the labor dispute.

Picketing at an industrial plant involved in a labor dispute has traditionally been carried on by labor unions with the hope of isolating that employer from a variety of normal business relations. It seeks to cut off his labor supply by inducing present employees to cease work and prospective employees not to enter the plant. It attempts to turn away servicemen of all kinds, such as electricians or plumbers doing maintenance work. It may deter customers or salesmen. It is aimed at pickups and deliveries, whether by rail or truck, common or private carrier. To all who would enter the plant, the conventional plea is not to cross the picket line. In its simplest form such primary picketing is addressed indiscriminately to everyone who approaches the struck plant. No one, as we understand the contentions, suggests that such picketing is unlawful even when addressed to a truck driver making deliveries on behalf of a neutral employer. *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665.

The size and complexity of modern industrial plants make it possible to have employees enter at one gate, to make shipments and receive deliveries at a second, and to have salesmen and customers use a third. On this basis the argument has been advanced that picketing at the gate where pickups and deliveries are made violates Section 8(b)(4) because it is not directed at employees of the struck employer. This Court flatly rejected the argument in *Local 761, International Union of Electrical Workers* v. *National*

Labor Relations Board (*General Electric Co.*), 366 U.S. 667. Not only did the Court state unequivocally (p. 681)—

> if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations. * * *

but it held that the union was privileged to picket a separate gate if used by servicemen engaged in normal maintenance work in the struck plant, as distinguished from independent new construction.

The court below distinguished the *General Electric* case upon the ground that the picketing took place at the gate leading to a 35-foot strip bordering the plant owned by the railroad and on which the tracks were located, rather than at a gate to Carrier's premises (R. 391, 407). The matter of title is immaterial. The picketing took place on a public way, as it usually does. From every practical or functional standpoint, whether in terms of labor relations or practical business operations, it made no difference whether the tracks were on land owned by Carrier or the railroad. The frequent references to picketing at the premises of the primary employer which are found, in one form of words or another, in Board and court opinions, have been used in distinguishing picketing at the place of the labor dispute from picketing at some quite different location such as the site of a secondary employer's

own business. Under the *General Electric* case, the railroad's mere use of the strip adjacent to the Carrier plant to perform tasks which aid Carrier's everyday operations cannot be regarded as an independent business which would warrant protection against the Union's picketing.

Nothing in the Board's ruling interferes with the purpose of Congress to bring secondary pressure against railroad companies under Section 8(b)(4) by changing the words "the employees of any employer" to read "any individual employed by any person engaged in commerce or in an industry affecting commerce." The aim was to treat railroads like other secondary employers, such as servicemen or truck drivers, not to give them a preferred position because sometimes they make deliveries to the plant on tracks which they own rather than on the primary employer's driveway or a public street.

Finally, we point out that the allegations of violence are utterly irrelevant to the application of Section 8(b)(4) although they are important under Section 8(b)(1)(A), which is not involved here.

ARGUMENT

INTRODUCTION

The question presented is whether Section 8(b)(4)(B) of the Act, as amended by the Labor-Management Reporting and Disclosure Act of 1959, forbids a union, in furtherance of a lawful strike at a manufacturing plant, from picketing the entrance to a railroad-owned

spur track immediately adjacent to the struck premises for the purpose of inducing the railroad personnel not to make pickups or deliveries there. Under Section 8(b)(4)(B) it is an unfair labor practice for a labor organization—

> (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> * * * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * * *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing, * * *

This section, like the corresponding provision of the earlier Taft-Hartley Act, is directed only at what is known as the "secondary boycott." *Local 761, International Union of Electrical Workers v. National Labor Relations Board (General Electric Company),*

366 U.S. 667, 672. The proviso to clause (B), added in 1959, for the first time made explicit what the Board and the courts had deemed implicit in the 1947 statute—that the "primary strike or primary picketing" is not proscribed.[6] It is clear that the acts complained of in the present case are covered by clauses (i) and (ii). Moreover, since the "object" of the picketing was to bring about a cessation of the railroad's normal services to the struck plant, the conduct appears to come within the literal terms of clause (B), if that language is construed without reference to the proviso. The crucial question is whether the union's activity constituted "primary picketing" and is therefore sheltered by the proviso.

The terms "primary and secondary" had a varying meaning at common law,[7] and Congress has never undertaken to define them. Instead, it has left to the Board and to reviewing courts the delicate task of striking a balance between "the right of labor organi-

[6] The proviso was added because it was feared that the deletion of the word "concerted" from the 1947 provision might be construed as overruling *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665, which held immune from Section 8(b)(4)(A) not only picketing at the primary employer's plant but also the inducement of truck drivers, employed by other employers, as they approached the picketed premises. See *Local 761, International Union of Electrical, Workers* v. *National Labor Relations Board*, 366 U.S. at 681; 105 Cong. Rec. 16589, II *Leg. Hist. of the Labor-Management Reporting and Disclosure Act*, 1959 (G.P.O., 1959) 1707.

[7] See Hellerstein, *Secondary Boycotts in Labor Disputes*, 47 Yale L.J. 341 (1938); 93 Cong. Rec. 4198–4199, 2 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O. 1948), pp. 1106–1109.

zations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Bldg. Trades Council*, 341 U.S. 675, 692. Since the "objectives of any picketing include a desire to influence others from withholding from the employer their services or trade," *General Electric, supra*, at 673, the distinction between legitimate primary and prohibited secondary activity "does not present a glaringly bright line." Accordingly, while the "secondary boycott" problem has given rise to a substantial body of litigation, both in the Board and in the courts, the scope of the two basic concepts has remained a matter of considerable uncertainty. The labyrinthine history of this litigation is summarized in the majority and dissenting opinions below and in more elaborate detail elsewhere.[8] It is unnecessary to repeat the story here. This is a simple—indeed, elementary—case of picketing at the scene of a labor dispute to induce railroad men approaching the struck plant not to make pickups and deliveries there. That such picketing, even though addressed to the employees of a neutral employer, is traditional primary conduct was confirmed by this Court two years ago in the *General Electric* case. That decision is wholly dispositive of the present case and requires a reversal of the decision below.

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[8] See, *e.g.*, Lesnick, *The Gravamen of the Secondary Boycott*, 62 Col. L. Rev. 1363 (1962); Koretz, *Federal Regulation of Secondary Strikes and Boycotts—Another Chapter*, 59 Col. L. Rev. 125 (1959); Note, 45 Geo. L. J. 614 (1957).

I

THE UNION'S PICKETING AT THE GATE THROUGH WHICH THE RAILROAD GAINED ACCESS TO THE STRUCK PLANT WAS TRADITIONAL PRIMARY PICKETING PROTECTED BY THE PROVISO TO SECTION 8(b)(4)(B) OF THE NATIONAL LABOR RELATIONS ACT.

1. Picketing at an industrial plant involved in a labor dispute has traditionally been conducted by labor unions in the hope of isolating the offending employer from a variety of normal business relationships. It seeks to cut off his labor supply by inducing present employees to cease work and prospective employees not to enter the plant. It attempts to turn away servicemen of all kinds, such as electricians and plumbers doing maintenance work. It may deter customers or servicemen. It is aimed at pickups and deliveries, whether by rail or truck, common or private carrier. To all who would enter the plant, the conventional plea is not to cross the picket line. In its simplest form such primary picketing is addressed indiscriminately to everyone approaching the struck plant. No one, as we understand the contentions, suggests that such picketing is unlawful even when addressed to a truckdriver making deliveries on behalf of a neutral employer. *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665.

The size and complexity of the modern industrial plant makes it possible to have employees enter at one gate, to make shipments and receive deliveries at a second, and to have salesmen and customers use a

third. The argument has sometimes been advanced that picketing at the separate gate where pickups and deliveries are made violates Section 8(b)(4) because it is not directed at employees of the struck employer. That argument was flatly rejected in *Local 761, International Union of Electrical Workers* v. *National Labor Relations Board* (*General Electric Co.*), 366 U.S. 667. In that case, the union, in furtherance of a lawful strike against General Electric, picketed all the entrance gates to the General Electric plant, including a gate which the company had reserved for exclusive use by the employees of independent contractors who were performing a variety of tasks—*e.g.*, construction work, retooling, and general maintenance—at the premises. The sole issue was the lawfulness of the picketing at the separate gate. Since that gate was 550 feet away from the nearest gate available to the company's own personnel and had been set apart for the avowed purpose of insulating those personnel from the contractors' frequent labor disputes, it was plainly unnecessary for the union to picket there in order to make an effective appeal to the primary employees. Indeed, the union so stipulated. The Board found, therefore, that the union's object was to "enmesh [the] employees of the neutral employers in its dispute with the Company." On that ground alone—the same ground upon which the court of appeals rested its decision here—the Board held that the picketing was forbidden by the statute. The court of appeals affirmed the Board's decision. 278 F. 2d 282 (C.A.D.C.).

In this Court, the union took the position, reflected in some of the early Board cases,* that any picketing conducted at the primary premises is automatically primary. The company, on the other hand, relied upon the principle which forms the keystone of the Second Circuit's decision in the present case—*i.e.*, that every appeal to secondary employees is automatically secondary. This Court rejected both positions. It pointed out that "the location of the picketing at the primary employer's premises [is] 'not necessarily conclusive' of its legality" (366 U.S. 679). At the same time, however, the Court made it abundantly clear that not all picketing directed at secondary employees is unlawful. "[P]icketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer" (366 U.S. 673–674). The key to the problem, the Court stressed,

> * * * is found in the type of work that is being performed by those who use the separate gate. It is significant that the Board has since applied its rationale, first stated in the present case, only to situations where the independent workers were performing tasks

* See *Oil Workers International Union, Local 346 (The Pure Oil Co.)*, 84 NLRB 315 (1949); *United Electrical Radio and Machine Workers, Local 813 (Ryan Construction Corp.)*, 85 NLRB 417 (1949). See also *Newspaper & Mail Deliverers' Union (Interborough News Co.)*, 90 NLRB 2135 (1950).

> unconnected to the normal operations of the struck employer—usually construction work on his buildings. In such situations, the indicated limitations on picketing activity respect the balance of competing interests that Congress has required the Board to enforce. *On the other hand, if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations.* * * * (366 U.S. 680–681) [Emphasis added.]

Since the Board had failed to recognize that the picketing at the separate gate would be lawful if that gate was used to any significant degree by "employees of independent contractors who performed conventional maintenance work necessary to the normal operations of General Electric" (*id.* at 682), this Court remanded the case for a determination of that critical question of fact. Upon remand, the Board found that the work was of such character as to make the picketing primary. 138 N.L.R.B. No. 38, 342.

Whether or not the reasoning in *General Electric* would go so far as to justify picketing addressed to secondary employees at a site far removed from the scene of the primary labor dispute, such as the place where the secondary employer independently carries on his own separate business, need not be decided in this case. Whatever else it may have held, the Court in *General Electric* held at the very least that a striking union may lawfully establish a picket line

at the primary employer's place of business in an effort to persuade neutral employees approaching the plant not to perform services—*e.g.*, pickups or deliveries or routine maintenance work—which are part of the offending employer's normal operations. The principles and precedents involving picketing at the common site in which two employers regularly and continuously carry on their independent businesses[10] are inapplicable where the second employer's only function is to make deliveries or to pick up goods at the struck plant, or to perform there other tasks related to its normal operation. They apply "only to situations where the independent workers [are] performing tasks unconnected to the normal operations of the struck employer—usually construction work on his buildings" (366 U.S. at 680).

2. There is no meaningful distinction between the instant case and *General Electric*. As we have indicated (*supra*, pp. 3–4), the Carrier plant is bounded on

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[10] See *Sailors' Union of the Pacific* (*Moore Drydock Co.*), 92 NLRB 547, 548 (1950); *National Labor Relations Board* v. *Denver Bldg. Trades Council*, 341 U.S. 675; *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694; *National Labor Relations Board* v. *Local Union No. 55* (PBM), 218 F. 2d 226 (C.A. 10). See also *National Labor Relations Board* v. *Local 294, International Brotherhood of Teamsters*, 284 F. 2d 887 (C.A. 2); *Sales Drivers, Local 859* v. *National Labor Relations Board* (*Campbell Coal Co.*), 229 F. 2d 514 (C.A. D.C.), certiorari denied, 351 U.S. 972, Board's order subsequently enforced, *sub nom Truck Drivers, Local 728* v. *National Labor Relations Board*, 249 F. 2d 512 (C.A. D.C.), certiorari denied, 355 U.S. 958; *National Labor Relations Board* v. *General Drivers, Local 968* (*Otis Massey Co.*), 225 F. 2d 205 (C.A. 5), certiorari denied, 350 U.S. 914.

the west by Thompson Road, a public thoroughfare, and on the south by the right-of-way owned by the New York Central, a strip of land thirty-five feet wide. On that strip, the railroad maintains a spur track which serves the Carrier plant as well as other industrial plants nearby. Both the Carrier premises and the railroad right-of-way are enclosed within the same chain-link fence, which runs from north to south along the Thompson Road frontage of the plant premises and then extends from west to east along the southern side of the right-of-way. The spur track is accessible only through a gate in the chain-link fence at the point where the track crosses Thompson Road. The gate is padlocked when not used by the railroad and is closed both to Carrier employees and the general public. The disputed picketing in this case took place on Thompson Road immediately outside the railroad gate. The pickets did not attempt to interfere with the performance of the railroad switching service to and from plants other than Carrier, but sought merely to induce the railroad and its personnel to refrain from picking up loaded freight cars at the Carrier plant and replacing them with empty cars. These services, as the Board found (R. 366), were related to Carrier's normal operations.

These circumstances make it evident that the picketing at the railroad gate was indistinguishable in any significant respect from the picketing ultimately held to be lawful in *General Electric*, or, for that matter, from the picketing that was carried on at the gates used by truck drivers to make deliveries to the Carrier plant. In all three instances, the union addressed

its appeal to neutral employees as they approached the struck premises. In each case, the pickets were stationed on a public thoroughfare immediately outside an entrance gate in the enclosure which surrounded the struck plant. The railroad personnel, like the truck drivers, and like the maintenance workers in *General Electric*, performed tasks at the struck plant which aided the normal operations of the primary employer's business. The railroad men, like the truck drivers, were urged to discontinue their services to Carrier but not to any other employer. The effect of the picketing at the railroad gate upon the New York Central Railroad was identical in character to the effect of the admittedly lawful picketing upon the independent contractors whose employers serviced General Electric's machines and upon the neutral employers whose drivers made truck deliveries to the Carrier plant.

The court below distinguished the *General Electric* case on the sole ground that the 35-foot strip of land on which the railroad gate was located was owned by the New York Central, whereas the driveways to which the gates in *General Electric* gave access were owned by General Electric itself. But whatever significance the ownership of the picketed premises may have in other situations, it plainly has none in a case such as this, where the properties of the primary and secondary employees are contiguous and, indeed, enclosed by the same fence. Here, as in *General Electric*, the picketing took place on a public way. The pickets made their appeal to the neutral employees as close as they possibly could to the struck premises without

trespassing upon private property. In these circumstances, the fact that title to the right-of-way was held by the railroad was wholly immaterial. From every practical or functional standpoint, whether in terms of labor relations or practical business operations, it made no difference whether the tracks were on land owned by Carrier or by the railroad. The frequent references, in Board and court opinions, which suggest that picketing may make a deliberate appeal to neutral employees only where it occurs at the premises of the primary employer, involve cases where the picketing takes place at a site, usually far removed from the primary employer's plant, where the secondary employer is engaged, not merely in servicing the primary employer's operation, but in his own business.[11] In these situations, the interest of the second-

[11] See *National Labor Relations Board* v. *United Brotherhood of Carpenters*, 184 F. 2d 60 (C.A. 10), certiorari denied, 341 U.S. 947; *National Labor Relations Board* v. *Local 294, International Brotherhood of Teamsters*, 284 F. 2d 887 (C.A. 2); *Truck Drivers, Local 728* v. *National Labor Relations Board*, 249 F. 2d 512 (C.A. D.C.), certiorari denied, 355 U.S. 958; *National Labor Relations Board* v. *International Hod Carriers, Local No. 1140*, 285 F. 2d 397, 401 (C.A. 8), certiorari denied, 366 U.S. 903; *Superior Derrick Corp.* v. *National Labor Relations Board*, 273 F. 2d 891 (C.A. 5), certiorari denied, 364 U.S. 816; *Sailors' Union of the Pacific* (*Moore Drydock Co.*), 92 NLRB 547 (1950); *Brewery and Beverage Drivers, Local 67* (*Washington Coca Cola Bottling Works*), 107 NLRB 299 (1953); *Retail Fruit & Vegetable Clerks' Union* (*Crystal Palace Market*), 116 NLRB 856 (1956). Cf., however, *Seafarers International Union* v. *National Labor Relations Board* (*Salt Dome Production Co.*), 265 F. 2d 585 (C.A. D.C.); *Local 861, International Brotherhood of Electrical Workers* (*Plauche Electric, Inc.*), 135 NLRB 250 (1962).

ary employer is such that he may well be entitled to be insulated against purposeful involvement in the primary dispute. But the mere use by the railroad of the right-of-way to perform tasks auxiliary to Carrier's everyday operations can no more be regarded as an independent business of the railroad, warranting protection against the Union's picketing, than could the use of the driveways by the trucks making deliveries at the other Carrier gates. That was the teaching of *General Electric*.

A contrary rule would make it possible for any employer to prevent appeals to neutral employees performing routine deliveries or maintenance services at the plant, merely by deeding to the secondary employers certain of the driveways and parking areas leading to the plant. Indeed, it is noteworthy that the railroad right-of-way in this very case was formerly owned by Carrier and later transferred to the railroad. It would be absurd, we submit, to hold that picketing at the railroad gate for the purpose of persuading railroad personnel not to serve the struck plant—picketing which would undeniably have constituted primary activity at the time when Carrier owned the right-of-way—became secondary activity the moment title changed hands. The passage of title is a fortuitous circumstance bearing no relationship whatever to the considerations which ought to determine where the line between primary and secondary activity should be drawn.

3. One further point deserves mention. Carrier argued in the court below that to uphold the picket-

ing at the railroad gate would thwart the congressional intent to extend the protection against secondary boycotts to railroads and their employees. That contention is groundless.

Under the original Section 8(b)(4)(A), which made it unlawful to induce "the employees of any employer" to engage in a secondary work stoppage, there was a question as to whether this prohibition applied to secondary boycotts effected through the inducement of railroad employees, since railroads and their employees were excluded from the definition of "employer" and "employee" in Sections 2(2) and 2(3) of the Act.[12] Congress, in 1959, made it clear that it intended to reach secondary boycotts achieved through pressure against non-statutory employees, such as railroad workers, as well as those achieved through pressure against statutory employees. Thus, it amended Section 8(b)(4) to proscribe the inducement of secondary work stoppages by "any individual employed by any person engaged in commerce or in an industry affecting commerce."[13] However, as pointed out by Chief Judge Lumbard in his dissent below (R. 418), "nothing in the statute or its history indicates an intent to give railroads greater protection in this regard than other employers because of their status as common carriers or for any

[12] See *International Woodworkers of America* (*W. T. Smith Lumber Co.*), 116 NLRB 1756, reversed, 246 F. 2d 129 (C.A. 5); *Lumber & Sawmill Workers* (*Great Northern Railway Co.*), 122 NLRB 1403, reversed, 272 F. 2d 741 (C.A. 9).

[13] See 105 Cong. Rec. 14347, 16589, 18022; II *Leg. Hist. of the Labor-Management Reporting and Disclosure Act, 1959* (G.P.O., 1959) 1522–1523; 1706–1707, 1712.

other reason." In sum, the purpose of the 1959 amendments was to afford railroads the same protection against secondary boycotts which other employers enjoyed, not to shield them against the effects of legitimate primary activity.

II

THE ALLEGATIONS OF VIOLENCE HAVE NO BEARING UPON THE STATUS OF THE PICKETING UNDER SECTION 8(b)(4)

There is no merit to Carrier's contention that the picketing at the railroad gate cannot be regarded as legitimate primary activity because it was accompanied by force and violence. The precise contention was rejected in *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665, 672:

> In the instant case the violence on the picket line is not material. * * * To reach it, the complaint more properly would have relied on § 8(b)(1)(A) or would have addressed itself to local authorities. The substitution of violent coercion in place of peaceful persuasion would not in itself bring the complained-of conduct into conflict with § 8(b)(4). It is the object of the union encouragement that is proscribed by that section, rather than the means adopted to make it felt. [Footnotes omitted.]

So here, the force and violence at the railroad gate could have been, and were indeed, checked under

Section 8(b)(1)(A) and state processes.[14] But, as in *Rice Milling*, it has no bearing on whether the Union's picketing was primary or secondary for purposes of Section 8(b)(4)(B). Nor is a different conclusion required by the fact that the old Section 8(b)(4) merely made it unlawful to induce work stoppages by secondary employees, whereas the new Section 8(b)(4) also makes it unlawful "(ii) to threaten, coerce, or restrain any person." Clause (ii) is linked to the objects defined in the succeeding subparagraphs, and subparagraph (B), the one relevant here, has a proviso which, we have shown (pp. 11–12, *supra*), specifically protects primary activities. Hence, it is not enough that the means utilized might meet the requirements of clause (ii); to violate Section 8(b)(4)(B), the activity must also have the secondary object proscribed by (B). In sum, as Chief Judge Lumbard pointed out (R. 417–418), "the distinction between primary and secondary picketing is based, as it was in cases arising under the statute prior to the 1959 amendment, on a consideration of the union's objective. * * * It is this distinction, not a

[14] The Board found that, by such conduct, the Union violated Section 8(b)(1)(A) of the Act, entered an appropriate remedial order, and the Union consented to the entry of decree enforcing that order (n. 5, *supra*). The Union was also subject to an injunction issued in state court proceedings which, *inter alia*, limited the places and extent of picketing and enjoined violent or disorderly conduct. (R. 418, n. 4.)

distinction between peaceful and violent means, which adjusts the conflicting interests of the union and neutral employees for purposes of § 8(b)(4)."

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the case remanded with directions to enter a decree denying Carrier's petition to review and set aside the Board's order dismissing the complaint.

Respectfully submitted.

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SEPTEMBER, 1963.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Sec. 2. When used in this Act—

* * * * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any in-

dividual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * * *

Sec. 8. * * *

* * * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7:

* * * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; * * *

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